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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-890

JACKIE HO SEE, *Petitioner*,

vs.

JUAN L. PANGELINAN, *Respondent*.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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OPINIONS BELOW

The opinions of the District Court of Guam[1] and the United States Court of Appeals for the Ninth Circuit[2] are unreported.

JURISDICTION

The judgment of the United States Court of Appeals[3] was entered on October 10, 1972. Jurisdiction to review that judgment by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

[1]Record at 33-40, Appendix A.
[2]Appendix B.
[3]*Ibid.*

THE QUESTION

Does Federal Rule of Civil Procedure 41(b)[4] govern the effect of a dismissal under Federal Rule of Civil Procedure 12(b) (6) for failure to state a claim upon which relief can be granted[5]?

RULES INVOLVED

"DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

". . . .

"**(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or ob-

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[4]"Unless the court in its order for dismissal otherwise specifies, . . . any dismissal not provided for in this rule * * * operates as an adjudication upon the merits."

[5]Another question, "Can United States Courts of Appeals submit cases without allowing the parties any oral argument whatsoever?" is presented in Jackie Ho See vs. United States Court of Appeals for the Ninth Circuit, No. ..... (U.S. Sup. Ct., docketed Dec. ....., 1972).

jection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." FED. R. CIV. P. 12.

"DISMISSAL OF ACTIONS

". . . .

"**(b) Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as pro-

vided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." FED. R. CIV. P. 41.

THE CASE

Nature of case.

This is an action for money had and received brought by Respondent against Petitioner in the District Court of Guam[6] entitled, "Juan L. Pangelinan, Plaintiff, vs. Jackie Ho See, Defendant," Civil Case No. 37-71. Record at 1, Appendix C.

Course of proceedings in District Court.

Respondent's "Complaint for Money Had and Received," Record at 1, Appendix C, was filed on March 5, 1971, and states,

> "2. That plaintiff claims of the defendant, Jackie Ho See, the sum of $15,627.00 due from defendant for money had and received on 26 De-

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[6]"There is created a court of record to be designated the 'District Court of Guam', and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine." 48 U.S.C. § 1424(a).

cember, 1969, representing overpayment made to defendant by plaintiff concerning the sale of real estate properties designated as Lot No. 1155 and Lot No. 1156, Agana, territory of Guam.

"3. That demand was made upon the defendant for the return of said sum of $15,627.00, including interest thereon from 26 December 1969, but said defendant refused and still continues refusing to do so.

"4. That defendant now owes plaintiff said sum of $15,627.00, including interest thereon from 26 December 1969."

In his answer thereto Petitioner affirmatively set forth the defense of res judicata:

"On or about January 12, 1971, plaintiff herein filed a complaint against defendant herein in an action in this court entitled Juan L. Pangelinan v. Dolores T. Matagulay et al., Civil Case No. 80-70. The prior action was between the same parties on the same claim. On February 17, 1971, the court entered judgment for defendant herein. No appeal was taken from the judgment, and it has since become final. The former action is res judicata of the issues raised by the complaint herein and is a bar to the present action." Record at 18, Appendix D.

At the trial Petitioner's Exhibits G and H were received in evidence. Exhibit G is an "Amended Complaint . . . for Money Had and Received" filed in a prior action between Respondent and Petitioner, Juan L. Pangelinan vs. Jackie Ho See et al., Civil Case No. 80-70 (D. Guam, filed January 12, 1971):

"That out of the $25,837.50 that the defendant Jackie Ho See received from the plaintiff, $10,210.50 represents the total cost price of 272.28 square meters, constituting the total area of Lots 1155 and 1156, at the rate of $37.50 per square meter, as agreed upon, and the sum of $15,627.00 represents an excess payment which the defendant Jackie Ho See is now holding in trust.

". . . .

"That either on or after the sale of Lots 1155 and 1156, the defendant Jackie Ho See had become the successor in interest of the other defendants, or had become owner of said lots and had kept for his use and benefit all of the $25,837.50 and that the defendant Jackie Ho See now owes the plaintiff the sum of $25,837.50 for money had and received." Appendix E.

And Exhibit H is a judgment entered in the prior action on February 17, 1972:

"This cause came on to be heard on defendant Jackie Ho See's motion to dismiss the complaint against said defendant on the ground that it fails to state a claim against said defendant upon which relief can be granted, and the court having granted the said motion,

"It is Ordered and Adjudged:

"That there is no just reason for delay in entering this judgment.

"That the complaint and this action be and the same hereby are dismissed against defendant Jackie Ho See." Appendix F.

Disposition in District Court.

"Defendant's defense that the plaintiff is barred from recovery in this action by virtue of a judgment entered by this Court under Civil Case No. 80-70 is without merit.

"The plaintiff in Civil Case No. 80-70 is one and the same plaintiff in the instant case. In Civil Case No. 80-70, the grantors of the Quitclaim Deed were also made party defendants, in addition to the defendant in this instant case. The gravamen of the action in Civil Case No. 80-70 was the rescission of the Quitclaim Deed and for recovery of the full purchase price of $25,837.50.

"Ho See's motion in Civil Case No. 80-70 was based on Rule 12(b) (6), Federal Rules of Civil Procedure, to dismiss the complaint on the ground that it fails to state a claim against the defendant upon which relief can be granted. The motion was directed primarily to the first cause of action seeking the rescission of the Quitclaim Deed, albeit, the second cause of action,[7] for money had and received, was closely intertwined to the first cause of action.

"The motion was granted primarily[8] on the ground that plaintiff has failed to allege a claim which would entitle him to a rescission of the quitclaim as it relates to the defendant Ho See, since Ho See was not a party to the Quitclaim Deed.

"In the instant action, the grantors of the Quitclaim Deed are not named as parties, and the plaintiff's sole cause of action against the defend-

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[7]The District Court here refers to the second count of the prior action. *Compare* Appendix E *with* Appendix C.

[8]Perhaps "primarily," but certainly not solely. *Compare* Appendix F *with* Appendix E.

ant in the instant case is for money had and received.

"What is actually determined in the Court's dismissal of Civil Case No. 80-70 is the legal sufficiency of the particular statements therein presented. It is a disposition of the question of whether the particular statements therein contained constitute a claim for relief. The merits of the case was not then tested, since affidavits and other documents outside the pleading were not presented which might have converted the motion to one for summary judgment under Rule 56, Federal Rules of Civil Procedure, hence dispositive of the merits.

"A dismissal of the instant action by invocation of res judicata would lead to a harsh result in this particular situation, especially so, since there was really no adjudication on the merits.

"The plaintiff is entitled to judgment against the defendant in the amount of $15,627.00, plus interest and costs.

"Let Judgment issue." Record at 39-40, Appendix A.

Judgment was entered in favor of Respondent, Record at 41, Appendix F, and Petitioner took an appeal to the United States Court of Appeals for the Ninth Circuit[9] entitled, "Juan L. Pangelinan, Plaintiff-

[9]"The courts of appeals shall have jurisdiction of appeals from all final decisions of . . . the District Court of Guam . . . , except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291.

"Appeals from reviewable decisions of the . . . territorial courts shall be taken . . .

". . . .

". . . From the District Court of Guam, to the Court of Appeals for the Ninth Circuit." 28 U.S.C. § 1294(4).

Appellee, vs. Jackie Ho See, Defendant-Appellant," No. 72-1922. Record at 42, Appendix G.

Course of proceedings in Court of Appeals.

Petitioner, relying on Federal Rule of Civil Procedure 41(b), argued that the present action is barred by the prior dismissal:

> "A dismissal on the ground that the complaint fails to state a claim upon which relief can be granted is on the merits and has the effect of invoking the principle of res judicata to bar any further attempt to present the same claim. *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967); *Wight v. Montana-Dakota Utilities Co.*, 299 F.2d 470, 476-78 (9th Cir. 1962), *cert. denied*, 371 U.S. 962 (1963).
>
> "'[A] dismissal for failure to state a cause of action is a final judgment on the merits sufficient to raise the defense of res judicata in a subsequent action between the parties. . . . Wight v. Montana-Dakota Utilities Co., 9 Cir., ...' *Glick v. Ballentine Produce, Inc.*, 397 F.2d 590, 593 (8th Cir. 1968).
>
> "Where a judgment of dismissal does not otherwise specify it operates as an adjudication on the merits. *Ma Chuck Moon v. Dulles*, 237 F.2d 241, 242 (9th Cir. 1956), *cert. denied*, 352 U.S. 1002 (1957).
>
> "'Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an ad-

judication upon the merits.' FED. R. CIV. P. 41(b)." Defendant-Appellant's Brief at 5-6.

Disposition in Court of Appeals.

The Court of Appeals affirmed the District Court's judgment without any mention whatsoever of Federal Rule of Civil Procedure 41(b):

> "The district court properly concluded that the present suit is not barred by the judgment entered in the earlier suit brought by plaintiff against defendant and others.
>
> "The earlier suit was dismissed solely[10] because the remedy of rescission was unavailable. If plaintiff had elected to sue on one of two available remedies and lost he could not sue again; but '[w]here a judgment is rendered in favor of the defendant because the plaintiff seeks a form of remedy which is not available to him, the plaintiff is not precluded from subsequently maintaining an action in which he seeks an available remedy.' Restatement of Judgments § 65(2); *Warren Co. v. Neel*, 284 F.Supp. 203 (W.D. Ark. 1968), *aff'd*, 406 F.2d 775 (8th Cir. 1969) (contract and rescission remedies)." Appendix B.

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[10]This is wrong. "[B]ecause the remedy of rescission was unavailable" is only one of the reasons the prior action was dismissed. *Compare* Appendix F *with* Appendix E. According to the District Court's judgment the prior case was dismissed for no other reason than that the amended complaint "fails to state a claim against said defendant upon which relief can be granted." Appendix F.

ARGUMENT

FEDERAL RULE OF CIVIL PROCEDURE 41(b) GOVERNS THE EFFECT OF A DISMISSAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

"[P]laintiffs claimed distinction between a dismissal on the pleadings and a dismissal on the merits is irrelevant here because of Rule 41(b)

. . . .

". . . [A] dismissal for failure to state a cause of action is a final judgment on the merits sufficient to raise the defense of res judicata in a subsequent action between the parties." *Glick v. Ballentine Produce, Inc.*, 397 F.2d 590, 592-93 (8th Cir. 1968).

"Appellant filed an action in the District Court against the appellee for breach of contract. Appellee moved to dismiss the action for the reason that the complaint failed to state a claim upon which relief could be granted. By order of July 3, 1957, the District Judge granted appellee's motion and ordered 'that the complaint herein is hereby dismissed at plaintiff's costs.' No appeal was taken.

"On September 30, 1957, appellant filed the present action in the District Court against the appellee upon the same alleged cause of action. Appellee filed a motion for summary judgment in which it referred to the order of July 3, 1957, in the first case and stated that it constituted a complete bar against the prosecution by the appellant of this action. The District Judge ruled 'Motion granted, pursuant to Rule 41(b).', and an order was entered dismissing the action at appellant's costs. This appeal followed.

> "Since the order of dismissal in the first case was not by reason of lack of jurisdiction or improper venue and did not specify that it was not upon the merits, under Rule 41(b), Rules of Civil Procedure, 28 U.S.C.A. it operated as an adjudication upon the merits. . . . Appellant did not request leave to amend or that the order of dismissal provide that it was without prejudice. The District Judge correctly ruled that it operated as a bar to the present action. . . . .
>
> "The judgment is affirmed." *Bartsch v. Chamberlin Co. of America, Inc.*, 266 F.2d 357, 358 (6th Cir. 1959).

The decision of the United States Court of Appeals for the Ninth Circuit is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Bartsch v. Chamberlin Co. of America, Inc., supra,* 266 F.2d 357 (6th Cir. 1959), and the decision of the United States Court of Appeals for the Eighth Circuit in *Glick v. Ballentine Produce, Inc., supra,* 397 F. 2d 590 (8th Cir. 1968).

The United States Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not been but should be decided by this Court. *Compare Bell v. Hood,* 327 U.S. 678 (1946), *with Costello v. United States,* 365 U.S. 265 (1961):

> "Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.

Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." *Bell v. Hood, supra,* 327 U.S. 678, 682 (1946).

"It is the petitioner's contention that the order dismissing the earlier complaint must be construed to be with prejudice because it did not specify that it was without prejudice, and the ground of dismissal was not within one of the exceptions under Rule 41(b) of the Federal Rules of Civil Procedure. . . .

"We hold that a dismissal for failure to file the affidavit of good cause is a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b). . . . We think that petitioner misconceives the scope of this exception from the dismissals under Rule 41 (b) which operate as adjudications on the merits unless the court specifies otherwise. It is too narrow a reading of the exception to relate the concept of jurisdiction embodied there to the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter. We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim. . . .

"At common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim. . . .

"We do not discern in Rule 41(b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition. All of the dismissals enumerated in Rule 41(b) which operate as adjudications on the merits—failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law—primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them. It is therefore logical that a dismissal on one of these grounds should, unless the Court otherwise specifies, bar a subsequent action. In defining the situations where dismissals 'not provided for in this rule' also operates as adjudications on the merits, and are not to be deemed jurisdictional, it seems reasonable to confine them to those situations where the policy behind the enumerated grounds is equally applicable. . . .

". . . Nothing in the term 'jurisdiction' requires giving it the limited meaning that the petitioner would ascribe to it. Among the terms of art in the law, 'jurisdiction' can hardly be said to have a fixed content. It has been applied to characterize other prerequisites of adjudication which will not be re-examined in subsequent proceedings and must be brought into controversy in the original action if a defendant is to litigate

them at all." *Costello v. United States, supra,* 365 U.S. 265, 284-88 (1961) (footnotes omitted).

"In the light of the Costello decision, courts have recognized that Rule 41(b) does not apply in situations in which a case is dismissed because of some initial bar to reaching the merits of the plaintiff's claims, such as that plaintiffs failed to give bond for costs. On a similar principle it has been held that dismissals that do not reach the merits as for want of jurisdiction or because the action was premature or it was brought by the wrong plaintiff must be without prejudice.

"Dismissals under Rule 12(b) (6) for failure to state a claim on which relief can be granted pose a troublesome problem. A dismissal of this kind comes within the literal language of the last sentence of Rule 41(b) and it has been held that that rule governs the effect of the dismissal. Yet other cases have held that this kind of dismissal will not bar a second action. . . ." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2373 at 237-39 (1971) (footnotes omitted).

The United States Court of Appeals for the Ninth Circuit has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision:

"Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." FED. R. CIV. P. 41(b).

WHEREFORE Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in Juan L. Pangelinan, Plaintiff-Appellee, vs. Jackie Ho See, Defendant-Appellant, No. 72-1922.

Dated, Agana, Guam,
December 5, 1972.

HOWARD TRAPP,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

District Court of Guam
Territory of Guam

Civil Case No. 37-71

Juan L. Pangelinan, Plaintiff,
vs.
Jackie Ho See, Defendant.

[Filed May 2, 1972]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Court, sitting without a jury; and the Court, having heard the testimony adduced in the trial, and having examined the exhibits presented by the parties, and being fully advised in the premises, now finds the following:

Findings of Fact

Sometime in November 1969, Pangelinan, a resident of Agana Heights, indicated to one George Gabriel that he was interested in buying land in Agana. In the same month, a person by the name of Limtiaco, husband of one of the owners of properties (Lot Nos.

1155 and 1156) in Agana, came to the office of Ho See and apprised Ho See that the owners of the Agana properties are interested in exchanging their Agana properties for a one-hectare tract at Apra Heights, Guam. Limtiaco told Ho See that the total area of the Agana properties was 689 square meters.

Gabriel, informed by Ho See of the availability of the Agana lots, contacted Pangelinan and effectuated a meeting between Pangelinan and Ho See. This meeting took place on November 14, 1969, at Ho See's office in Agana, where Gabriel's office was also then located.

At this first meeting, Ho See told Pangelinan that he owned the two (2) lots in Agana, Lot Nos. 1155 and 1156, containing a total area of 689 square meters, which could be purchased at $40 per square meter. Ensuing discussion between the parties, the price was reduced to $37.50 per square meter, and the parties agreed at the full purchase price of $25,837.50, on the basis of 689 square meters at $37.50 per square meter. Pangelinan gave Ho See $1,000 and asked Ho See to hold the property up to November 30, 1969.

On December 1, 1969, Pangelinan again met Ho See and requested that the option to purchase be extended to December 24, 1969. Ho See agreed to do so if Pangelinan would put up $300. Pangelinan instead offered $500, which Ho See readily accepted.

During this period, Ho See informed Pangelinan that the properties were located near the "Piggy Bank", a cafeteria, about 300 feet from Ho See's of-

fice, but was not able to pinpoint the exact location of the lot because a property map was not available.

Pangelinan relied on Ho See's representation, and did not go to the Department of Land Management where the land records are kept to verify the records as to the two (2) lots.

Before the expiration of the option on December 24, 1969, Pangelinan told Ho See that he already had the money available in the bank and asked that the transaction be continued to December 26, 1969. Ho See was agreeable to extend it to December 26, provided he would not be bound if another buyer makes an offer.

On December 26, 1969, Pangelinan presented to Ho See a certified Bank of America check in the amount of $25,837.50, drawn by Oscar L. Calvo from whom Pangelinan got the money. The check was made payable to Island General Agency, the employer of Ho See. The said amount was deposited in the Island General Agency account. Ho See then delivered a check payable to Pangelinan in the amount of $1,500 as a refund of Pangelinan's deposit.

On the date the full payment of the purchase price on the property was made, Ho See told Pangelinan that the title to the lot would be transferred to Pangelinan at a later date.

Ensuing many unsuccessful attempts to get in touch with Ho See, Pangelinan finally met Ho See on the early part of Jaunary 1970, at the latter's office. At that time, Ho See gave Pangelinan a copy of a duly

recorded Quitclaim Deed, executed on 30 December 1969, by Dolores T. Matagulay, Juan T. Blas, Ignacio T. Blas, and Emiliana T. Limtiaco, owners of Lot Nos. 1155 and 1156, Agana, as grantors, and Juan L. Pangelinan, as grantee. During the entire transaction, Pangelinan was not aware of the existence of these grantors, let alone any knowledge that they were the owners of the properties he was purchasing from Ho See. The deed was recorded in the Department of Land Management on December 31, 1969. The recorded Quitclaim Deed recited the consideration as $10.00 and other good and valuable consideration. It also recited Lot Nos. 1155 and 1156, Agana, as the properties being quitclaimed, but the deed did not contain the areas of the lots.

Pangelinan examined the recorded Quitclaim Deed at Ho See's office where it was presented to him for the first time, and there and then inquired why the deed recited only $10.00 as consideration, instead of the full purchase price of $25,837.50, and why the areas of the lots were not shown on the deed. In response to Pangelinan's queries, Ho See asked an attorney, whose office was located next to Ho See's, to explain the matter to Pangelinan. The attorney informed Pangelinan that it was not necessary to show the area of the property in the deed.

Pangelinan refused to accept the deed; instead he went to the Department of Land Management to ascertain the matter. It was then that Pangelinan found out for the first time that Lot No. 1155 contained an area of 89.98 square meters, and Lot No. 1156 an area

of 182.3 square meters, the two (2) lots having a combined area of 272.28 square meters.

Pangelinan returned to Ho See's office with the newly obtained information and demanded that Ho See cancel the deed and return to him the full amount of the purchase price. Ho See told Pangelinan that he could not do so as he had, in the meantime, conveyed to the grantors named in the Quitclaim Deed his property located at Talisay, Guam, as an exchange for the two (2) Agana lots. Pangelinan then told Ho See that he would retain the two (2) lots, but demanded that Ho See reimburse him the difference between the purchase price of 689 square meters and that of 272.28 square meters. To this latter demand of Pangelinan, Ho See also refused to comply.

Pangelinan, relying on Ho See's representation, believed that Ho See was really the owner of Lot Nos. 1155 and 1156, and only knew for the first time, when the recorded deed was presented to him, that other people were the owners of the subject lots.

To effectuate the exchange of the Agana lots with the owners thereof, Ho See on 31 December 1969 executed a Deed of Conveyance conveying to the then owners of Lot Nos. 1155 and 1156, his own one (1) hectare of land designated as Lot No. 402-R10-2-4, Talisay, Agat, Guam, which property he had acquired from one Arthur Toves for a consideration of $12,000, primarily for the purpose of the contemplated exchange of properties. This deed was recorded in the Department of Land Management on January 12, 1970.

John Blas, one of the owners of Lot Nos. 1155 and 1156, Agana, in one of the discussions had with Ho See concerning the exchange of properties, informed Ho See that the total area of the Agana lots was 200+ square meters. This information was passed on to Ho See prior to the execution of the Quitclaim Deed.

Ho See acquired Lot No. 402-R10-2-4 in his own name, and the $12,000 paid for it was money obtained from the $25,837.50, which Pangelinan paid to Ho See as purchase price for Lot Nos. 1155 and 1156. Island General Agency was the payee in the certified check. Ho See deposited this money in the account of Island General Agency; and he subsequently withdrew the money to purchase the property from said account.

At no time during the transaction between the parties did Pangelinan expressly or impliedly represent to Ho See that he was acting as agent for anyone. At no time was Pangelinan acting as an agent for anyone. At no time did Ho See manifest to Pangelinan that he was acting on behalf of another party; and at no time did Ho See inform Pangelinan that the Agana lots were not owned by him, but rather owned by somebody else. At no time did Ho See inform Pangelinan that he was seeking to acquire the Agana lots from the then owners on a land exchange basis.

At the time that Ho See was negotiating with Pangelinan for the conveyance to the latter of Lot Nos. 1155 and 1156, Agana, Ho See knew that the total area of the two (2) lots were not 689 square meters but just a little over 200 square meters.

Lot Nos. 1155 and 1156, Agana, has a total area of 272.28 square meters, which at the time of the transaction between the parties had a sale price of $10,210.50 at the then agreed rate of $37.50 per square meter. The difference between the sale price for 689 square meters and 272.28 square meters is $15,627.00.

Conclusions of Law

From the foregoing facts the Court concludes:

The plaintiff purchased the properties under mistake of material facts induced by the defendant, namely, mistake as to the ownership of the properties, and mistake as to the area of size of the properties. The defendant knew that the plaintiff consummated the agreement under these mistakes of facts. Because of the mistake as to the area of the properties, plaintiff overpaid the purchase price to the defendant.

The machinations of the defendant in getting the real property owners, not known to plaintiff, to execute the Quitclaim Deed in their own names as grantors and plaintiff as grantee, had set up a scheme which would effectively preclude the plaintiff from seeking a remedy through rescission of the Quitclaim Deed. There was no real privity between the plaintiff and the grantors in the Quitclaim Deed. Even if plaintiff were able to rescind the Quitclaim Deed, he could not demand from the grantors the consideration paid for the properties under the Quitclaim Deed, since none of said consideration was received by the grantors but rather by the defendant, and there was

no collusion between the defendant and the grantors. Any rescission, if unilaterally made by the plaintiff, would only result in the grantors getting back their property, with plaintiff not getting the consideration in return. In effect, the plaintiff would be giving up something for nothing.

The defendant, having money belonging to the plaintiff which he has no right conscientiously to retain, has the duty to surrender the money to the rightful owner, the plaintiff. The facts and circumstances attendant thereto give rise to an implied promise to return the money—the excess payment. The contractual privity has thus been created.

Defendant's defense that the plaintiff is barred from recovery in this action by virtue of a judgment entered by this Court under Civil Case No. 80-70 is without merit.

The plaintiff in Civil Case No. 80-70 is one and the same plaintiff in the instant case. In Civil Case No. 80-70, the grantors of the Quitclaim Deed were also made party defendants, in addition to the defendant in this instant case. The gravamen of the action in Civil Case No. 80-70 was the rescission of the Quitclaim Deed and for recovery of the full purchase price of $25,837.50.

Ho See's motion in Civil Case No. 80-70 was based on Rule 12(b) (6), Federal Rules of Civil Procedure, to dismiss the complaint on the ground that it fails to state a claim against the defendant upon which

relief can be granted. The motion was directed primarily to the first cause of action seeking the rescission of the Quitclaim Deed, albeit, the second cause of action, for money had and received, was closely intertwined to the first cause of action.

The motion was granted primarily on the ground that plaintiff has failed to allege a claim which would entitle him to a rescission of the quitclaim as it relates to the defendant Ho See, since Ho See was not a party to the Quitclaim Deed.

In the instant action, the grantors of the Quitclaim Deed are not named as parties, and the plaintiff's sole cause of action against the defendant in the instant case is for money had and received.

What is actually determined in the Court's dismissal of Civil Case No. 80-70 is the legal sufficiency of the particular statements therein presented. It is a disposition of the question of whether the particular statements therein contained constitute a claim for relief. The merits of the case was not then tested, since affidavits and other document outside the pleading were not presented which might have converted the motion to one for summary judgment under Rule 56, Federal Rules of Civil Procedure, hence dispositive of the merits.

A dismissal of the instant action by invocation of res judicata would lead to a harsh result in this particular situation, especially so, since there was really no adjudication of the merits.

The plaintiff is entitled to judgment against the defendant in the amount of $15,627.00, plus interest and costs.

Let Judgment issue.

SO ORDERED.

Dated at Agana, Guam, this 2nd day of May, 1972.

/s/ Cristobal C. Duenas
Cristobal C. Duenas
Judge, District Court of Guam

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 72-1922

Juan L. Pangelinan,
Plaintiff-Appellee,
vs.
Jackie Ho See,
Defendant-Appellant.

[Filed October 10, 1972]

Appeal from the United States District
Court for the District of Guam

ORDER

Before: BROWNING, DUNIWAY, AND HUFSTEDLER,
Circuit Judges

The district court properly concluded that the present suit is not barred by the judgment entered in the earlier suit brought by plaintiff against defendant and others.

The earlier suit was dismissed solely because the remedy of rescission was unavailable. If plaintiff had elected to sue on one of two available remedies and lost he could not sue again; but "[w]here a judgment

is rendered in favor of the defendant because the plaintiff seeks a form of remedy which is not available to him, the plaintiff is not precluded from subsequently maintaining an action in which he seeks an available remedy." Restatement of Judgments § 65(2); *Warren Co. v. Neel,* 284 F.Supp. 203 (W.D. Ark. 1968), *aff'd* 406 F.2d 775 (8th Cir. 1969) (contract and rescission remedies).

AFFIRMED.

Appendix C

In the District Court of Guam
Territory of Guam

Civil Case No. 37-71

Juan L. Pangelinan, Plaintiff,

vs.

Jackie Ho See, Defendant.

[Filed March 5, 1971]

COMPLAINT FOR MONEY HAD AND RECEIVED

Plaintiff complains of the defendant and for causes of action, most respectfully alleges:

1. That this court has jurisdiction of this cause pursuant to and under the provisions of Section 22a of the Organic Act of Guam and Sections 62 and 82 of the Code of Civil Procedure of Guam in that the amount in controversy exceeds the sum of $5,000.00, exclusive of interest and costs.

2. That plaintiff claims of the defendant, Jackie Ho See, the sum of $15,627.00 due from defendant for money had and received on 26 December 1969, repre-

senting overpayment made to defendant by plaintiff concerning the sale of real estate properties designated as Lot No. 1155 and Lot No. 1156, Agana, territory of Guam.

3. That demand was made upon the defendant for the return of said sum of $15,627.00, including interest thereon from 26 December 1969, but said defendant refused and still continues refusing to do so.

4. That defendant now owes plaintiff said sum of $15,627.00, including interest thereon from 26 December 1969.

Wherefore, plaintiff demands judgment against the defendant for the sum of $15,627.00, interest and costs, and for such other and further reliefs as may be meet and proper in the premises.

Agana, territory of Guam 4 March 1971.

/s/ A. T. Lamorena
A. T. Lamorena
Attorney for Plaintiff

Appendix D

In the District Court of Guam

Civil Case No. 37-71

Juan L. Pangelinan, Plaintiff,

vs.

Jackie Ho See, Defendant.

[Filed June 1, 1971]

AMENDED ANSWER

First Defense

Defendant duly paid, satisfied, and discharged the alleged claim of plaintiff.

Second Defense

On or about January 12, 1971, plaintiff herein filed a complaint against defendant herein in an action in this court entitled Juan L. Pangelinan v. Dolores T. Matagulay et al., Civil Case No. 80-70. The prior action was between the same parties on the same claim. On February 17, 1971, the court entered judgment for defendant herein. No appeal was taken from the judgment, and it has since become final. The for-

mer action is res judicata of the issues raised by the complaint herein and is a bar to the present action.

Third Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Fourth Defense

Plaintiff has failed to join indispensable parties under Federal Rule of Civil Procedure 19.

Fifth Defense

Defendant generally denies all of the allegations contained in the complaint.

Wherefore defendant demands:

(1) That plaintiff take nothing.

(2) That the action be dismissed on the merits.

(3) That defendant recover of plaintiff his costs of action.

Trapp & Gayle,
By /s/ Howard Trapp,
A member of the firm,
Attorneys for defendant

Appendix E

In the District Court of Guam
Territory of Guam

Civil Case No. 80-70

Juan L. Pangelinan,
Plaintiff,

vs.

Dolores T. Matagulay, Juan T. Blas, Emiliana B. Limtiaco, Aka Emiliana T. Blas, Ignacio T. Blas, and Jackie Ho See,
Defendants.

[Filed January 12, 1971]

AMENDED COMPLAINT FOR RESCISSION OF CONTRACT AND FOR MONEY HAD AND RECEIVED

Plaintiff complains of the defendants and for causes of action most respectfully alleges:

First Cause of Action

I

That this court has jurisdiction of this cause pursuant to and under the provisions of Section 22a of

the Organic Act of Guam and Sections 62 and 82 of the Code of Civil Procedure of Guam in that the value of the property in question, or the amount paid exceeds Five Thousand ($5,000.00) Dollars, USC, exclusive of interest and costs.

II

That at all times herein mentioned, the plaintiff is or was the Vendee of Lots 1155 and 1156, Agana, Guam; the defendants Dolores T. Matagulay, Juan T. Blas, Emiliana B. Limtiaco, Aka Emiliana T. Blas, and Ignacio T. Blas appeared to be the Owners and Vendors of said Lots 1155 and 1156, Agana, Guam; and the defendant Jackie Ho See, is or was the person who effected the sale of said lots and induced the plaintiff as purchaser and who, according to information, became the other defendants' successor in interest, or owner of Lot 1155 and 1156 and beneficiary of all of the proceeds of said sale.

III

That on or before November 14, 1969, the defendant Jackie Ho See, either acting for himself and/or for the other defendants, for the purpose of inducing the plaintiff made certain false and fraudulent representations concerning Lots 1155 and 1156, Agana, Guam, well knowing such representations to be false.

IV

That the false representations made by the defendant Jackie Ho See to the plaintiff was that the total

area of said lots was 689 square meters, at Thirty-Seven Dollars and Fifty Cents ($37.50) per square meter, or a total purchase price of Twenty-Five Thousand Eight Hundred and Thirty-Seven Dollars and Fifty Cents ($25,837.50).

V

That the plaintiff, relying upon the representations made by the defendant Jackie Ho See that the said lots had a total area of 689 square meters, and being interested to buy said lots because of the area involved, agreed to buy said lots 1155 and 1156, Agana, Guam, for the price of Thirty-Seven Dollars and Fifty Cents ($37.50) per square meter, or a total consideration of Twenty-Five Thousand Eight Hundred and Thirty-Seven Dollars and Fifty Cents ($25,837.50) in three (3) payments, as evidenced by three (3) receipts duly signed by said defendant Jackie Ho See, marked as Exhibits "1", "2", and "3", hereto attached as part of this complaint.

VI

That on or about December 30, 1969, the defendant Jackie Ho See delivered to the plaintiff a Quit-Claim Deed signed by the defendants Dolores T. Matagulay, Juan T. Blas, Ignacio T. Blas, and Emiliana B. Limtiaco, and recorded with the Department of Land Management, Government of Guam, as Instrument No. 92879, which deed is hereto attached as Exhibit "4" and made part of this complaint.

VII

That the plaintiff, after receiving the said Quit-Claim Deed, went to the office of the Department of Land Management, Government of Guam, for the purpose of obtaining in his own name the corresponding Certificates of Title of said lots and while there the plaintiff found that the representations of the defendant Jackie Ho See were false and fraudulent, in that the actual total area of said lots was only 272.28 square meters, that is Lot 1155—89.98 square meters, and Lot 1156—182.3 square meters, which lots would have cost only Ten Thousand Two Hundred and Ten Dollars and Fifty Cents ($10,210.50), based on the agreed consideration of $37.50 per square meter, instead of the $25,837.50 which the defendant Jackie Ho See collected and received from the plaintiff.

VIII

That the plaintiff, upon knowing that the total area of said lots was only 272.28 square meters, immediately went to see the defendant Jackie Ho See and returned the said Quit-Claim Deed, Exhibit "4", and demanded the same to be rescinded or cancelled, and the return of said sum of $25,837.50, which was paid to the defendants.

IX

That the plaintiff relied upon the representations of the defendant Jackie Ho See, believing them to be true, and would not have agreed to purchase said lots had he known the said representations were false and fraudulent.

X

That a notice of rescission, both oral and written, was given to the defendants, but said defendants refused, and still continue refusing, to so rescind said Quitclaim Deed and return the money paid.

Second Cause of Action

I

That plaintiff realleges paragraphs I thru X of the First Cause of Action.

II

That out of the $25,837.50 that the defendant Jackie Ho See received from the plaintiff, $10,210.50 represents the total cost price of 272.28 square meters, constituting the total area of Lots 1155 and 1156, at the rate of $37.50 per square meter, as agreed upon, and the sum of $15,627.00 represents an excess payment which the defendant Jackie Ho See is now holding in trust.

III

That either on or after the sale of Lots 1155 and 1156, the defendant Jackie Ho See had become the successor in interest of the other defendants, or had become owner of said lots and had kept for his use and benefit all of the $25,837.50 and that the defendant Jackie Ho See now owes the plaintiff the sum of $25,837.50 for money had and received.

WHEREFORE, plaintiff demands judgment against the defendants as follows:

1. To rescind the Quitclaim Deed;
2. To order the defendant Jackie Ho See to pay the plaintiff the sum of Twenty-Five Thousand Eight Hundred and Thirty-Seven Dollars and Fifty Cents ($25,837.50), plus interest;
3. To order the defendants to pay the costs; and
4. For such other and further reliefs as may be meet and proper in the premises.

Agana, territory of Guam, 12 January 1970

/s/ A. T. Lamorena
A. T. Lamorena,
Attorney for Plaintiff.

Appendix F

In the District Court of Guam

Civil Case No. 80-70

Juan L. Pangelinan, Plaintiff,

vs.

Dolores T. Matagulay, Juan T. Blas, Emiliana B. Limtiaco (also known as Emiliana T. Blas), Ignacio T. Blas, and Jackie Ho See, Defendants.

[Filed February 17, 1971]

JUDGMENT

This cause came on to heard on defendant Jackie Ho See's motion to dismiss the complaint against said defendant on the ground that it fails to state a claim against said defendant upon which relief can be granted, and the court having granted the said motion,

It is Ordered and Adjudged:

That there is no just reason for delay in entering this judgment.

That the complaint and this action be and the same hereby are dismissed against defendant Jackie Ho See.

Dated: February 17, 1971.

/s/ Cristobal C. Duenas
Cristobal C. Duenas, Judge
District Court of Guam.

Appendix G

In the District Court of Guam

Civil Case No. 37-71

Juan L. Pangelinan, Plaintiff,
vs.
Jackie Ho See, Defendant.

[Filed May 3, 1972]

NOTICE OF APPEAL

Notice is hereby given that Jackie Ho See, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on 2nd May 1972.

Trapp, Gayle & Co.,
A professional corporation,
Through /s/ Howard Trapp,
A licensed employee,
Attorneys for defendant.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No.

JACKIE HO SEE, *Petitioner,*

VS.

JUAN L. PANGELINAN, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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JURISDICTION

Jurisdiction in this court is conceded.

ISSUES

1. The decision of the United States Court of Appeals for the Ninth Circuit is not in conflict with the decisions of other circuits.

2. The United States Court of Appeals for the Ninth Circuit has not sanctioned a departure by the District Court of Guam from the normal course of

judicial procedure and does not call for an exercise of this Court's power of supervision.

ARGUMENT

I

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The United States Court of Appeals for the Ninth Circuit adheres to the provisions of Rule 41(b), Federal Rules of Civil Procedure. Petitioner misconstrues the decision of the District Court of Guam in Civil Case No. 80-70, Appendix F of Petitioner's brief, and in Civil Case 37-71, Appendix A of Petitioner's brief. Likewise, the United States Court of Appeals for the Ninth Circuit did not erroneously construe the holding of the District Court of Guam in both cases.

The rule provides for a dismissal on the merits in certain specific types of cases unless the court in the valid exercise of its discretion chooses to dismiss without prejudice, however, the rule obviously does not apply to certain types of dismissals such as when the court lacks jurisdiction or when the plaintiff mistakes his remedy or similar cases. Respondent submits that this is such a case for the following reasons.

In Civil Case No. 80-70 plaintiff had no claim against the defendants Matagulay, Blas and Limtiaco, and sought the wrong relief against the defendant Ho See. Respondent contends that therefore the dismis-

sal was not a dismissal with prejudice within the meaning of Rule 41(b).

In Civil Case No. 37-71, the District Court of Guam made clear the reasons why the dismissal in Civil Case No. 80-70 was not within the provisions of Rule 41(b). It may be noted in passing that this was a motion to dismiss and not a motion for summary judgment under the rules.

The United States Court of Appeals for the Ninth Circuit in case No. 72-1922 held that the District Court properly concluded that the second suit was not barred by the judgment in Civil Case No. 80-70, stating that the earlier suit was dismissed solely because the remedy sought was unavailable.

Costello v. United States, 365 U.S. 265, 5 L.Ed.2d 551, 81 S.Ct. 534:

> "* * * We hold that a dismissal for failure to file the affidavit of good cause is a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b). In arguing contra, the petitioner relies on cases which hold that a judgment of denaturalization resulting from a proceeding in which the affidavit of good cause was not filed is not open to collateral attack on that ground. Title v. United States (CA 9 Cal) 263 F2d 28; United States v. Failla (DC NY) 164 F.Supp. 307. We think that petitioner misconceives the scope of this exception from the dismissals under Rule 41(b) which operate as adjudications on the merits unless the court specifies otherwise. It is too narrow a reading of the exception to relate the concept of jurisdiction embodied there to the fundamental juris-

dictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter. We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim. Failure to file the affidavit of good cause in a denaturalization proceeding falls within this category. * * *

* * * If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. * * *

We do not discern in Rule 41(b) a purpose to change this common law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition. * * *"

Durham v. Mason and Dixon Lines, Inc., 404 F.2d 864 (1968, 6 Cir.):

"* * * The sustaining of a motion to dismiss for failure to state a claim upon which relief can be granted is a judgment on the merits. * * * On the other hand, sustaining a motion to dismiss for failure to exhaust the grievance procedure provided in a collective bargaining agreement results only in a dismissal of the action without prejudice.

* * * This failure to exhaust the grievance procedure deprived the District Court of jurisdiction and therefore precluded a decision on the merits. * * *"

Safeway Stores v. Fannan, 308 F.2d 94 (1962, 9 Cir.):

"* * * That rule contemplates that ordinarily a dismissal (like a judgment upon a directed verdict) shall operate as a judgment upon the merits. But it grants a broad discretion to the judge to specify otherwise. * * *"

Warren Company v. Neel, 284 F.Supp. 203 (1968, Arkansas):

"* * * Although not specifically mentioned, 'election of remedies' is an essential element of the defendants' contention with respect to res judicata. However, the court is of the opinion that Warren's failure to originally pursue its claim for rescission and restitution is not fatal to its claim at this time. Without a doubt Warren mistakenly undertook to enforce its contract in the Chancery Court, but under the law of Arkansas, Ark.Stat.Ann. § 64-1201 et seq., the conditional sales contract, under which a lien was created, could not be enforced in an Arkansas court. * * *

In Midland Savings & Loan Co. v. Tradesmen's Nat. Bank, (10 Cir., 1932) 57 F.2d 686, the court at page 693 said:

The fact that it misconceived its remedy, or attempted to exercise a right to which it is not entitled, and was defeated, does not constitute an election, or preclude it from prosecuting an inconsistent, remedial right. * * *"

In § 383, Restatement of the Law, Contracts, the learned author states:

"If one of the remedies for breach of contract is not in fact available to the plaintiff, a mistaken effort made in good faith to obtain it is not a bar to a suit for a different remedy."

In 5A Corbin on Contracts, §1225, p. 492, the learned author states:

"It ought to be obvious that, when a plaintiff erroneously thinks that a certain remedy is available to him, his futile attempt to procure it by legal proceedings ought not to be described as an election between alternative remedies. * * *; and the fact that the defendant has committed a breach of duty and that some remedy other than the one erroneously sought was in fact available to the plaintiff ought not to make his penalty for the error more severe than that which must be borne by other losers. In general, the courts sustain this theory and hold that such a losing plaintiff is not barred from bringing another action for a different remedy on the theory that he has made a final and irrevocable election of remedy. * * *"

Peardon v. Chapman, 169 F.2d 909 (3rd Cir.):

"* * * Rule 41(b) of the Civil Rules has directly reversed equity's traditional doctrine that a dismissal without consideration of the merits is also without prejudice to the complainant. * * * Even so, the terms of dismissal have always been within the discretion of the court * * * This continues to be so under Rule 41. * * *

* * * On the occasion of the first postponement the Court had implied that the complaint would not be dismissed with prejudice. * * * Fol-

lowing the expression of opinion by the trial judge the second incident occurred, at which time the Court did not question the representation, made by a reputable member of the bar, of counsel's illness.

* * * Based on the Court's first expression it would seem that appellant anticipated nothing more drastic than a dismissal without prejudice. With no warning of the Court's uncommunicated change of thoughts as to dismissal, she was not afforded an opportunity of protecting her cause of action.

Under all the facts, in view of the intimation of dismissal without prejudice and of a situation thereafter arising less blameworthy than in the first instance, the dismissal with prejudice of plaintiff-appellant's cause of action was unwarranted."

II

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS NOT SANCTIONED A DEPARTURE BY THE DISTRICT COURT OF GUAM FROM THE NORMAL COURSE OF JUDICIAL PROCEDURE AND DOES NOT CALL FOR AN EXERCISE OF THIS COURT'S POWERS OF SUPERVISION.

Since the United States Court of Appeals for the Ninth Circuit does not fail to apply the provisions of Rule 41(b) and does not condone such departure by District Courts within the Circuit, it would seem that there is no reason to invoke the supervisory powers of this Court.

Petitioner fails to see the distinction between a dismissal under Rule 41(b) where the plaintiff has

chosen an available remedy and where plaintiff has either sought relief which the court did not have jurisdiction to grant, has brought an action not within the jurisdiction of this court, or has sued the wrong party.

Respondent submits that the second action was not barred by the dismissal in the first action and that no prejudice to the Petitioner existed.

CONCLUSION

For the foregoing reasons Respondent submits that certiorari should be denied.

Dated, Agana, Guam,
February 12, 1973.

Respectfully submitted,

FINTON J. PHELAN, JR.,
Attorney for Respondent.

ALBERTO T. LAMORENA,
Of Counsel.